Supreme Court, U.S.
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No. 91-926

In The

Supreme Court of the United States

October Term, 1991

SCOTT F. LINDE,

Petitioner,

vs.

CARRIER COAL ENTERPRISES, INC., and BARABARA WARAKOMSKI, COURT-APPOINTED RECEIVER FOR RAYMOND COLLIERY, CO., INC. AND ITS SUBSIDIARIES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF OF SCOTT F. LINDE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. THE "RULE OF PRACTICE" APPROACH TO NOTICE OF APPEAL REQUIREMENTS DESTROYS THE FINALITY OF DISTRICT COURT JUDGMENTS.

This Certiorari Petition presents an issue of paramount importance to the orderly administration of justice – whether a party adversely affected by a district court ruling is precluded from obtaining appellate court relief when that party fails to take an appeal from the adverse ruling. Respondent Carrier Coal Enterprises ("Carrier") argues and the Third Circuit ruled that an appellate court has the power to order relief in favor of a non-appealing party so long as that party's interests are "inextricably intertwined" with an appellant's interests. The Third Circuit's ruling rests on its finding that the requirements of Rule 4(a)(3) pertaining to cross-notices of appeal express a rule of practice, and not a jurisdictional prerequisite. No decision of this Court warrants this conclusion, and Carrier has not cited a single precedent of this Court that substantiates its claim to be the windfall beneficiary of Scott F. Linde's successful challenge to the district court order of January 24, 1989 (the "January 24th Order").

Indeed, Carrier's argument is in apparent conflict with rulings of this Court recognizing that a party who has failed to perfect an appeal from an adverse district court ruling is bound by that ruling. *See, e.g., Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1978).[1] Justice O'Connor, recently writing for the Court in *Smith*

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[1] It should be noted that two separate panels of the Third Circuit have held that a party's failure to perfect a separate appeal prevents the court from entertaining that party's appeal with respect to a lower court ruling that imposed joint and several liability even though a co-party had appealed that ruling. *See CTC Imports & Exports v. Nigerian Petroleum Corp.*, ___ F.2d ___, 1991 U.S. App. LEXIS 29470 (3rd Cir., filed December 19, 1991); *Landon v. Hunt*, 938 F.2d 450, 452 n.2 (3rd Cir. 1991).

v. Barry, ___ U.S. ___, 60 U.S.L.W. 4065, 4066 (1992), observed that notice of appeal requirements "are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." More than 50 years ago, this Court held that a federal appellate court does not have the power to modify a district court decree for the benefit of an appellee in the absence of a cross-appeal. *See Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937).

Consideration of the merits of this certiorari petition is essential to provide certainty with respect to the consequences of a failure to appeal. Under the "rule of practice" approach adopted by the Third Circuit, the interests of finality in litigation are subverted. Appellees and appellants alike are subject to having an appellate court grant relief in favor of a non-appealing party, *relief that the appellant did not seek*, because the appellate court perceives the interests of the appealing and non-appealing parties to be "inextricably intertwined." Under the Third Circuit approach, the appellant bears the expense and risks of an appeal, while the "interested" co-party merely rides the coattails of a successful appellate challenge.

The jurisdictional approach to notice of appeal requirements, on the other hand, promotes the interests of certainty and finality in litigation. All litigants and the court are provided proper notice that a party to the trial court proceedings is seeking relief from the appellate court by virtue of taking an appeal. Neither the litigants nor the court are left to guess as to whether a party who has failed to appeal hopes to secure relief if an appellant is successful because the failure to appeal renders final as to the non-appealing party the district court decree.

Carrier attempts to obscure the conflict between the jurisdictional and rule of practice approaches by asserting spurious attacks on the completeness and accuracy of Linde's petition. The accusations are not only baseless but also irrelevant. The incontrovertible facts material to the issue before this Court are:

(1) The January 24th Order, *inter alia*, disapproved of the conditional Assignment and was thus adverse to Carrier.

(2) The deadline for Carrier to appeal the adverse ruling was 60 days after the district court's March 7, 1989 denial of Linde's motion for reconsideration.[2]

(3) Carrier did not file a notice of appeal, but instead entered its appearance as an "appellee" in Linde's appeal from the district court's January 24th Order. (See the Entries of Appearance filed on behalf of Carrier in Linde's appeal, copies of which are included in the Supplemental Appendix hereto at 1c-4c.)

These are the only facts material to the question of whether the Third Circuit lacked jurisdiction to order relief in favor of Carrier with respect to the January 24th Order, and these material facts cannot be rationally distinguished from the factual contexts underlying *Torres* and *Morley Construction*. Accordingly, the certiorari petition should be granted to confirm the clear import of *Torres* and *Morley Construction*: any party who seeks to secure relief from an appealable district court order must perfect an appeal to vest the appellate court with jurisdiction to grant the requested relief.

II. THE CONSEQUENCE OF LINDE'S SUCCESSFUL CHALLENGE TO THE DISTRICT COURT'S JANUARY 24TH ORDER WAS NOT REINSTATEMENT OF THE ASSIGNMENT.

Carrier argues that the Third Circuit had the power to relieve Carrier from the January 24th Order because, in considering Linde's appeal, the Third Circuit necessarily considered Linde's challenge to the correctness of the district court's disapproval of the conditional Assignment. The unsound premise of this argument is that Linde's appeal destroyed the finality of the

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[2] See Fed.R.App.P. 4(a)(1) and (4). At page 4 of its Brief in Opposition to Linde's petition, Carrier erroneously asserts that the district court's Order of March 7, 1989 denied Linde's motion for stay pending appeal. The March 7th order denied Linde's Rule 59 motion, and Linde properly filed his notice of appeal of the January 24th Order following the entry of the March 7th Order. (App. 53a.) Linde's motion for a stay was denied by order dated March 29, 1989.

January 24th Order as it applied to Carrier. *Torres* and *Moitie* reject such a premise.

Carrier's argument also ignores the fact that Linde sought specific performance of the Agreement of Sale, not the Assignment. To secure his requested relief, Linde challenged the propriety of conducting a second judicial sale by contending that the district court had abused its discretion in finding that the conditional Assignment had improperly interfered with the first judicial sale. If there was no impropriety with respect to the first judicial sale, then confirmation of Linde's contract was warranted since no party submitted a competing proposal. Carrier's interests in the conditional Assignment were forfeited by its failure to appeal. Thus, the consequence of a finding that the disapproval of the Assignment constituted an abuse of discretion was not reinstatement of the conditional Assignment, but the confirmation of the Agreement of Sale to Linde.

Indeed, the continuing validity of the conditional Assignment was a matter that only Carrier could pursue. Conveniently omitted from Carrier's Brief in Opposition to Linde's Petition is any reference whatsoever to the fact that the Assignment, drafted by counsel for Carrier, expressly provided that both parties would be released from further liability under the Assignment if *Carrier* failed to obtain district court approval of the Assignment. (App. 7a.) Carrier thus not only had the right to appeal the district court disapproval of the conditional Assignment, but also had the obligation to pursue such an appeal if it intended to preserve the Assignment. As Carrier itself recognizes at page 21 of its Brief in Opposition to Linde's Petition, "the only relief to which [Linde] was entitled [was] confirmation of the Agreement of Sale as it stood at the close of bidding on September 2, 1988." *Torres* and *Morley Construction* compel the conclusion that Carrier could return itself to the position it occupied at the close of bidding on September 2, 1988 only by appealing the district court ruling.[3]

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[3] Carrier erroneously claims that "[t]he knot that inextricably binds Linde and Carrier together is . . . the Assignment." (Carrier Brief at p. 26

(Continued on following page)

It is self-evident that Carrier could not seek to enforce the conditional Assignment if neither party had appealed the January 24th Order. The fact that Linde alone appealed could not preserve Carrier's putative rights in the disapproved Assignment. Carrier cannot rationally distinguish cases such as *Torres*, where a party could not benefit from a co-party's successful appellate court pursuit of issues common to all parties. *Torres* does not turn upon the question of whether there are "separate" claims or "inextricably intertwined" interests, but on the bright line fact that a party failed to perfect an appeal.

Thus, Carrier's purported justification for its failure to appeal – an assumption that Linde's appeal necessarily protected its interests – did not vest the appellate court with the authority to grant Carrier relief with respect to the January 24th Order. Moreover, Carrier's assumption was unreasonable in that Linde could have discontinued his appeal after the deadline for Carrier to appeal had expired, thus leaving the January 24th order final as to Carrier.

The January 24th Order did not preclude the receiver from instituting an action against Carrier and/or Linde if the amount received by competitive bidding proved to be less than the amount to be paid for the property under the terms of the Assignment. (App. 47a.) As recognized by the Third Circuit, Carrier sought to "play both sides of the net at the same time" (App. 187a), claiming a right to enforce the assignment if Linde prevailed but currying favor with the Receiver by not seeking to stay the second judicial sale and not directly challenging the district court's Order. Such tactical litigation games should not be rewarded.

(Continued from previous page)

n.8.) Only if the Assignment's express conditions had been satisfied could Linde and Carrier have been bound by it. Since the district court disapproved the Assignment, the "knot" has never been tied.

III. LINDE HAS CONSISTENTLY ARGUED THAT CARRIER FORFEITED ITS RIGHTS UNDER THE ASSIGNMENT BY FAILING TO APPEAL THE JANUARY 24TH ORDER.

Carrier falsely contends that it was not until Linde opposed Carrier's Petition for Panel Rehearing in November of 1989 that Linde argued "for the first time before any court that he believed that the Assignment was no longer valid due to Carrier's failure to file a notice of appeal from the district court's January 24, 1989 Order." (Carrier's Brief in Opposition to the Certiorari Petition at p.5.) Linde's position had been articulated both to Carrier and in court proceedings well before the Third Circuit heard argument on Linde's appeal. Carrier also wrongfully accuses Linde of deliberately misleading Carrier and the Third Circuit with respect to Linde's position concerning the Assignment. (*Id.* at 26-28.)

At no time during the appeal did Linde request that the conditional Assignment be reinstated. In his Motion for Stay Pending Appeal and in his principal Brief filed with the Third Circuit, both of which were served on Carrier well-before Carrier's appeal deadline, Linde made clear that he was requesting specific enforcement of the Agreement of Sale. On April 28, 1989, Linde assigned his interests under the Agreement of Sale to Lackawanna Land & Energy, Inc., an action completely consistent with his position that the Assignment was a nullity. Carrier was aware of the assignment to Lackawanna Land & Energy. At the second judicial sale conducted on May 26, 1989, Linde announced to the Receiver, Carrier, and all other persons present that if he prevailed on his appeal, he and his assign, Lackawanna Land & Energy, Inc., would seek "specific performance of the Agreement of Sale." (App. 61a.)

On May 31, 1989, Linde and Lackawanna Land & Energy brought an action against the Receiver to compel specific performance of the Agreement of Sale. (Supp. App. at 5c-9c.) On June 13, 1989, Carrier petitioned to intervene in the specific performance action, acknowledging that Linde's position was adverse to Carrier's. (Supp. App. 10c-13c) In

their Answer to the Petition to Intervene, Linde and Lackawanna Land & Energy argued that "the assignment to Carrier . . . , by its terms, *became null and void when the district court on January 24, 1989, refused to approve of the assignment and Carrier . . . failed to appeal the district court's decision.*" (Supp. App. 15c; emphasis added.)

Thus, Linde had informed Carrier of his position with respect to the Assignment prior to the Third Circuit entertaining oral argument on Linde's appeal. Furthermore, Linde did not solicit Carrier's involvement in his appeal. Carrier appeared at the oral argument without any encouragement from Linde and with full knowledge that Linde considered the Assignment to be a nullity. The Third Circuit "assumed" that the position of Linde and Carrier with respect to the Assignment were consistent because of *Carrier's* insinuation of itself into Linde's appeal. Carrier is thus responsible for the Third Circuit's erroneous assumption, not Linde.

Linde's position *vis a vis* Carrier's claims under the conditional Assignment was irrelevant to the Third Circuit's disposition of Linde's appeal. If Linde had informed the Third Circuit in direct terms that Carrier's failure to appeal the January 24th Order precluded Carrier from enforcing the Assignment the Third Circuit analysis would not have changed at all.

Linde's position with respect to the conditional Assignment did not become relevant in his appeal from the January 24th Order until Carrier sought to amend the Third Circuit mandate that authorized confirmation of the sale to Linde. As the Third Circuit recognized, Carrier's rehearing petition, was "pregnant . . . with the self-same issues" brought before the Third Circuit on Carrier's appeal from the denial of its motion to direct conveyance of the receivership properties to it. (App. to Carrier's Brief in Opposition to Linde's Petition, 47a.) Because the briefs filed in connection with Carrier's Petition for Panel Rehearing clearly apprised the Third Circuit that Linde and Carrier were pursuing separate agendas, the Third Circuit's summary denial of Carrier's petition is absolutely inconsistent with its later comments that Linde had misled the Panel.

Linde's position has always remained constant – his appeal was for his own account. Moreover, the Third Circuit's erroneous assumption that Linde was appealing so that the conditional Assignment could be enforced was precipitated by Carrier's conduct undertaken with full knowledge of Linde's position. Carrier's disingenuous argument that Linde has shifted his position in this litigation does not provide grounds for denying Linde's petition.

IV. CARRIER HAS WRONGFULLY ACCUSED LINDE'S COUNSEL OF MISSTATEMENTS AND OMISSIONS OF FACT AND LAW.

It is Carrier, and not Linde, that has distorted the factual record underlying Linde's petition. As noted above, Carrier's accusations concern irrelevant matters, but Linde cannot permit Carrier's affronting distortions to go uncorrected.

At page 10 of its Brief, Carrier baldly proclaims that "Linde's Petition . . . contains numerous statements of fact and law which are not based upon any documents of record. . . . " The only fact that Carrier then points to as lacking substantiation is the statement in the petition that Carrier had refused to execute a draft of the receiver's agreement that was almost identical to the draft contract presented to Linde. (Carrier Brief at 10.) Even if there was no substantiation for this factual assertion, the error on Linde's part would have no bearing on the issues before this Court. Significantly, however, Carrier's charge ignores the testimony presented at the hearing conducted by the district court on April 19, 1990. Specifically, Linde testified that the Receiver had caused Linde to believe that Carrier had refused to execute an agreement of sale virtually identical to the draft presented to Linde, and his testimony was corroborated by the testimony of the receiver's administrative assistant, Barbara Warakomski. (Transcript of April 19, 1990 Hearing at 90-93, 273-77, 287; Supp. App. at 18c-28c.)

Carrier further complains of Linde's reference to the undeniable fact that on May 30, 1989, the first business day after the second judicial sale, Carrier requested the return of

the escrowed cash consideration for the conditional Assignment. Linde simply reported these facts because they are part of the case chronology.

Linde is not attempting to create an "issue" with respect to the return of the cash consideration insofar as his petition is concerned. It must be noted, however, that, contrary to Carrier's suggestion, Linde did not concede that the conditional Assignment remained in full force and effect despite the return of the escrowed consideration. While Carrier refers to the letter of Attorney Allan Kluger as evidence that *he* had agreed that the refund of the cash consideration would not affect the Assignment, it has ignored Mr. Kluger's Affidavit in which he explains that his letter "was intended to convey that it was *[his]* understanding that the return of the escrowed funds would not prejudice either parties' position with respect to the continued validity of the Assignment." (App. 219a-221a; emphasis added.) Carrier also ignores Linde's Affidavit in which he states that he "was content that the escrow fund be released to Carrier because [he] did not believe that [he] had any further claim against that money in light of Carrier's failure to obtain [district court] approval of the Assignment." (App. 218a.)

Finally, Carrier contends that Linde has omitted material facts by failing to state that his Motion to Stay the issuance of the Third Circuit mandate pending the filing of his certiorari petition had been denied and that Linde did not request a stay from this Court. The denial of a stay of issuance of the mandate has no precedential significance with respect to the grant of the certiorari petition. Moreover, Linde has taken what he believes to be the appropriate steps by asking the district court to exercise its inherent discretion to stay the proceedings before it pending this Court's decision on the certiorari petition. The district court has already exercised such discretion *sua sponte* by staying proceedings until the outcome of Carrier's appeal to the Third Circuit. Linde's stay motion is still pending before the district court and a conveyance of the property to Carrier is not imminent. If a conveyance becomes imminent, Linde will take the appropriate action in this Court to preserve the status quo.

Furthermore, Carrier's argument ignores the fact that this Court can decide the merits of Linde's petition without further briefing or argument. *See* Rule 16.1 of the Rules of the Supreme Court. Indeed, in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982)(*per curiam*), this Court granted certiorari and summarily reversed the Third Circuit without requiring briefing on the merits where the Third Circuit improvidently accepted jurisdiction over an appeal based upon a notice of appeal filed before the disposition of a Rule 59 motion despite the clear terms of Rule 4(a)(4), which provides that a notice of appeal filed before a decision on a Rule 59 motion shall have no effect. It is respectfully submitted that summary disposition on the merits is appropriate in this case.

CONCLUSION

For these various reasons, the Petition for a Writ of Certiorari of Scott F. Linde should be granted.

Respectfully submitted,

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Scott F. Linde

THIS FORM MUST BE COMPLETED IN FULL WHETHER OR NOT YOU INTEND TO ACTIVELY PARTICIPATE

APPEARANCE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

United States of America)
)
)
)
vs.)
)
Tabor Court Realty Corp., et al.)
Scott F. Linde, Party to)
Agreement of Sale,)
Appellant)
)

No. 89-5157

(Filed Mar. 13, 1989)

Enter my appearance for: (XXXXXXX/appellee; XXXXXX-XXXXXXX)

Name of Party Represented Carrier Coal Enterprises, a Pennsylvania Limited Partnership

(sign) /s/ Robert Spielman

Type or Print Name Robert Spielman

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Telephone No. 717-826-5664

U.S. GOV'T F.T.S. TEL. NO., IF APPLICABLE

✓ I intend to actively participate in this case by filing a brief on the merits.
Please enter my appearance on the docket.

_ I intend to adopt or join in the brief of another party.
Please enter my appearance on the docket.

I **do not** intend to actively participate in this case.

_ I understand that my appearance **will not be entered** on the docket and that I will receive no further correspondence from the Court of Appeals.

THIS FORM MUST BE COMPLETED IN FULL WHETHER OR NOT YOU INTEND TO ACTIVELY PARTICIPATE

APPEARANCE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

United States of America)
)
) *No.* 89-5198
)
vs.)
)
Tabor Court Realty Corp., et al.)
Scott F. Linde, Party to)
Agreement of Sale,)
Appellant)

Enter my appearance for: (XXXXXXX/appellee; XXXXXX-XXXXXXX)

Name of Party Represented Carrier Coal Enterprises, a Pennsylvania Limited Partnership

(sign) /s/ Robert Spielman

Type or Print Name Robert Spielman

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_____

SCOTT F. LINDE and LACKAWANNA LAND AND ENERGY, INC.	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiffs	:	CIVIL ACTION – EQUITY
vs.	:	
THOMAS H. KILEY, RECEIVER OF RAYMOND COLLIERY CO., INC. AND ITS SUBSIDIARIES	:	NO. ___ of 1989
Defendant	:	

COMPLAINT

1. Plaintiff, Scott F. Linde, is an adult individual residing in the Borough of Honesdale, County of Wayne, Commonwealth of Pennsylvania.

2. Plaintiff, Lackawanna Land and Energy, Inc., is a Pennsylvania Corporation with its principal place of business located in the City of Scranton, County of Lackawanna, Commonwealth of Pennsylvania.

3. Defendant, Thomas H. Kiley, Receiver of Raymond Colliery Co., Inc. and its subsidiaries (hereinafter referred to as "Raymond"), is and at all times mentioned was the duly appointed Receiver of Raymond, the owner of the following described real estate located in the County of Lackawanna, Commonwealth of Pennsylvania, and more particularly described in Exhibit A:

(a) Powderly Bank, located in the Township of Carbondale, Lackawanna County, and approximately 61.93 acres contiguous to said Powderly Bank;

(b) Jermyn Bank area, located in the Borough of Jermyn, Lackawanna County, and approximately 46.30 acres contiguous to said Jermyn Bank;

(c) Northwest Bank, also known as Gravity Slope Bank, located in the Borough of Archbald, Lackawanna County and approximately 3.5 acres contiguous to said Northwest Bank;

(d) Eddy Creek, located partially in the Borough of Throop and partially in the Borough of Olyphant, Lackawanna County and approximately 85 acres contiguous to said Eddy Creek;

(e) Grassy Island, located in the Borough of Olyphant, Lackawanna County, and approximately 16.30 acres contiguous to said Grassy Island;

(f) Marvine Bank #6 located in the City of Scranton, Lackawanna County and approximately 5.30 acres contiguous to said Marvine Bank #6; and

(g) Moffat Bank area, located in the Borough of Taylor, Lackawanna County and approximately 29.10 acres contiguous to said Moffat Bank.

COUNT I

4. Plaintiffs hereby incorporate the averments in paragraphs 1 through 3 as if the same were set forth herein at length.

5. On or about May 20, 1988, the Receiver entered into an Agreement of Sale with Scott F. Linde or his assigns whereby defendant agreed to sell and convey to Linde or his assigns and Linde agreed to purchase from

defendant the real estate described in paragraph 3 above under the terms and conditions of the Agreement of Sale, a copy of which is attached hereto as Exhibit "B."

6. The Agreement of Sale provided, *inter alia*, that the sale was subject to prior approval of the United States District Court for the Middle District of Pennsylvania and the Receiver agreed to "use reasonable best efforts to obtain said Court approval."

7. By Order of the United States District Court for the Middle District of Pennsylvania dated August 8, 1988, the Sale was made subject to public bids to be scheduled pursuant to a legal notice, a copy of which is attached hereto as Exhibit "C."

8. The legal notice indicated that the Receiver would accept bids for the subject property in an amount not less than 110% of the purchase price as set forth in the Agreement of Sale and that if no bids were offered the Receiver would "seek final confirmation from the United States District Court for the Middle District of Pennsylvania to conduct the sale in accordance with the Agreement of Sale."

9. No bids were received by the Receiver pursuant to the Court directed bidding procedure.

10. Plaintiff, Scott F. Linde, has performed all of the covenants and conditions of the Agreement of Sale to be performed on his part.

11. Plaintiff, Scott F. Linde, was, at all times mentioned, and is now ready, willing and able to complete the transaction called for by the Agreement of Sale on his part.

12. On or about November 21, 1988, the Receiver filed a Motion to Impose Remedies for Unlawful Interference with a Court Directed Sale of Real Property in an attempt to defeat the terms of the Agreement of Sale.

13. Defendant has breached his obligations under the Agreement of Sale by refusing to use his best efforts to effectuate the terms of the Agreement of Sale.

14. On or about April 28, 1989, Scott F. Linde assigned all of his right, title and interest in and to the Agreement of Sale to Lackawanna Land and Energy, Inc. A copy of the Assignment is attached hereto as Exhibit "D."

15. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that this Honorable Court:

1. Enter a degree requiring and ordering defendant specifically to perform under the Agreement of Sale according to its terms, conditions and provisions;

2. Enjoin and restrain defendant from transferring, conveying, mortgaging or otherwise disposing of or alienating the subject real estate during the pendency of this suit;

3. Award plaintiffs costs of this suit; and

4. Award plaintiffs such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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Attorneys for Plaintiffs
Scott F. Linde and
Lackawanna Land
and Energy, Inc.

DATED: May 31, 1989

SCOTT F. LINDE and LACKAWANNA LAND AND ENERGY, INC.	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiffs	:	CIVIL ACTION – EQUITY
vs.	:	
THOMAS H. KILEY, RECEIVER OF RAYMOND COLLIERY CO., INC. AND ITS SUBSIDIARIES	:	NO. 57 of 1989
Defendant	:	

PETITION TO INTERVENE

(Filed June 13, 1989)

COMES NOW, Carrier Coal Enterprises, a Pennsylvania partnership ("Carrier"), by its attorneys, Rosenn, Jenkins and Greenwald, and avers as follows:

1. Carrier is a Pennsylvania partnership whose primary offices are located at 11 East 44th Street, Suite 1700, New York, New York 10017.

2. On or about May 20, 1988, Thomas H. Kiley, Receiver of Raymond Colliery Co., Inc., and its subsidiaries ("Receiver") entered into an agreement of Sale ("Agreement of Sale") with Scott F. Linde ("Linde") or his assigns for the sale of certain real estate interests ("Real Estate Interests").

3. On or about April 28, 1989, Linde attempts to assign all of his right, title, and interest in the agreement of Sale to Lackawanna Land and Energy, Inc. ("Lackawanna").

4. In their Complaint against the Receiver, Linde and Lackawanna request, inter alia, the issuance of a decree requiring the Receiver to perform specifically his obligations under the Agreement of Sale with Linde.

5. However, on September 2, 1988, Linde had *also* assigned all of his interests under the Agreement of Sale to Carrier.

6. The assignment between Linde and Carrier took place over eight months prior to the assignment between Linde and Lackawanna.

7. The assignment between Linde and Carrier was disapproved by the Federal District Court for the Middle District of Pennsylvania ("District Court"), which has jurisdiction over the receivership of Raymond Colliery Co., Inc. and its subsidiaries ("Raymond").

8. The District Court's disapproval of the assignment between Linde and Carrier is the subject of an appeal filed by Linde to the United States Court of Appeals for the Third Circuit ("Third Circuit"), where the matter is now pending.

9. In its order disapproving the assignment between Linde and Carrier ("Order"), the Middle District also directed the Receiver to advertise and conduct a second auction ("Second Auction") of the Real Estate Interests. A copy of the Order is attached as Exhibit "A".

10. Linde requested a stay of the Order, but the stay request was denied by both the District Court and the Third Circuit.

11. A Second Auction for the sale of the Real Estate Interests was held by the Receiver on May 26, 1989.

12. Carrier was the successful bidder for the Real Estate Interests at the Second Auction.

13. Since Linde had assigned his rights under the Agreement of Sale to Carrier eight months prior to the attempted assignment to Lackawanna, since the propriety of the assignment between Linde and Carrier is the subject of an appeal now pending before the Third Circuit, and since Carrier was the successful bidder for the Real Estate Interests at the Second Auction held by the Receiver, following the denial by the Middle District and the Third Circuit of Linde's stay request, it is readily apparent that Carrier's legally enforceable interest in the Real Estate Interests will be adversely affected by the instant complaint of Linde and Lackawanna, wherein Linde and Lackawanna seek the issuance of a decree compelling the Receiver to perform specifically his alleged obligations to sell the Real Estate Interests to Linde and Lackawanna under the Agreement of Sale.

14. If permitted to intervene as a defendant in the instant proceeding, Carrier will remove this matter to the Middle District. Attached to his Petition is a copy of the pleading which Carrier will file.

WHEREFORE, Carrier prays that the Court grant its Petition to intervene as a defendant in this matter.

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SCOTT F. LINDE and LACKAWANNA LAND AND ENERGY, INC.	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiffs,	:	CIVIL ACTION - EQUITY
vs.	:	
THOMAS H. KILEY, RECEIVER OF RAYMOND COLLIERY CO., INC. AND ITS SUBSIDIARIES	:	NO. 57 of 1989
Defendant,	:	

ANSWER AND NEW MATTER OF PLAINTIFFS SCOTT F. LINDE AND LACKAWANNA LAND AND ENERGY, INC., TO THE PETITION TO INTERVENE FILED BY CARRIER COAL ENTERPRISES

Come Now the plaintiffs, Scott F. Linde and Lackawanna Land and Energy, Inc., by their attorneys, Dilworth, Paxson, Kalish & Kauffman, and make answer as follows:

1. Plaintiffs lack information sufficient to form a belief about the allegations of Paragraph 1 and said allegations are deemed denied.

2. Admitted.

3. The allegations of Paragraph 3 are admitted with the qualification that on April 28, 1989, plaintiff Scott F. Linde *did* assign all his right, title and interest in the Agreement of Sale to plaintiff Lackawanna Land and Energy, Inc.

4. Admitted.

5. Admitted. However, the assignment to Carrier Coal, by its terms, became null and void when the district court on January 24, 1989, refused to approve of the assignment and Carrier Coal failed to appeal the district court's decision.

6. The allegations of Paragraph 6 are admitted to the extent that the attempted assignment of Linde to Carrier predated Linde's assignment to Lackawanna Land and Energy, Inc.

7. Admitted.

8. The allegations in Paragraph 8 are admitted to the extent Linde has filed an appeal from the district court's decision of January 24, 1989. By way of further answer, the primary thrust of Linde's appeal is to reverse the district court's decision that refused to confirm the Agreement of Sale between Linde and the Receiver since no higher bid was made by the September 2, 1988 bidding deadline.

9. Admitted. By way of further answer, Linde's appeal, *inter alia*, contests the validity of the second auction.

10. Admitted.

11. Admitted.

12. The allegations of Paragraph 12 are admitted to the extent that Carrier was the high bidder at the second auction. By way of further answer, it is incorrect for Carrier to characterize itself as a successful bidder since the United States District Court for the Middle District of Pennsylvania has yet to approve sale of the subject real

estate to Carrier for the price Carrier bid at the second auction.

13. All allegations of Paragraph 13 are denied. It is specifically denied that Carrier currently possesses any vested, legally enforceable interest in the real estate which is the subject of this lawsuit. By way of further answer, because it is entirely possible that the Third Circuit Court of Appeals, which is scheduled to hear argument on Linde's appeal on July 10, 1989, will uphold the district court regarding its decision to invalidate the assignment from Linde to Carrier while reversing the district court on its decision to make the Agreement of Sale subject to a second bidding procedure, Carrier's interest is a highly contingent one and, thus, not legally enforceable at this time.

14. Plaintiffs lack knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 14 and said allegations are deemed denied.

WHEREFORE, plaintiffs pray that the court deny the Petition to Intervene filed by Carrier Coal Company.

NEW MATTER

15. The Petition to Intervene filed by Carrier Coal Enterprises is procedurally defective in that it is not verified by a party as mandated by Rules 1024(c) and 2328 of the Pennsylvania Rules of Civil Procedure.

16. The Petition to Intervene filed by Carrier Coal Enterprises does not acknowledge that Carrier's claim is in subordination to and in recognition of the propriety of

the action as mandated by Rule 2329(1) of the Pennsylvania Rules of Civil Procedure.

17. There is no need for Carrier to intervene as its interest in the litigation is already adequately represented by Defendant Thomas H. Kiley.

18. Carrier meets none of the criteria to be a proper intervenor as outlined in Rule 2327 of the Pennsylvania Rules of Civil Procedure.

WHEREFORE, plaintiffs pray that the court dismiss the Petition to Intervene filed by Carrier Coal Company.

Respectfully submitted,

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Attorneys for Plaintiff
Scott F. Linde

Dated: June 26, 1989

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
vs.	:	CIVIL NO:
GLENEAGLES INVESTMENT CO., INC., et al	:	80-1424
DEFENDANT	:	

BEFORE THE HONORABLE MALCOLM MUIR, U. S. DISTRICT COURT JUDGE, IN WILLIAMSPORT, PENNSYLVANIA, ON THURSDAY, THE 19TH DAY OF APRIL, 1990

HEARING ON COLLUSION
Volume I - Pages 1 to 171

APPEARANCES:

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[p. 90] from Carrier Coal, they're very angry that I've agreed to include Clinton Colliery in our Wayne County land, I wouldn't call it deal but transaction, and that would you please call your brother and ask if they would consider taking this Clinton Colliery property out of it. I said that I would do so but that I didn't hold out a lot of hope for it.

Q Did you contact your brother?

A Yes, I did.

Q And as a result of that telephone conversation you were not able to take that particular tract out of the Wayne County transaction?

A Yes, he said we would take it out but then we would have to revert back to the original land that had been shown on the prospectus which was only 611 acres as opposed to 865 acres and would then want a prorated price from the $365,000 to somewhere in the neighborhood of $250,000, but that we would need to do that.

Q Did you then get back to Mr. Kiley?

A I think I got back to Mr. Kiley or – quickly but we had – I was on my way to Wilkes-Barre anyway, the bank representatives were from Wilkes-Barre and I think I stated something like well, I would be interested in possibly purchasing those agreements.

Q Purchasing the –

[p. 91] A Remaining agreements that Carrier – that he had led me to believe that Carrier had just refused to execute with him.

Q These would be what we describe as the seven parcels of land?

A Yes.

Q Now, did you meet with Mr. Kiley on May 19th, 1988?

A Yes, I went directly there. I stopped – it's only about a block and a half away, he said he would wait for me because it would be very close, I felt, to around five o'clock, it's two years ago, okay, and that I said I would be right up to pick up a copy of the proposed agreement for review.

Q By the way, I trust you knew where Mr. Kiley's office was and you had dealt with him before?

A Yes, I had dealt with him both in a lease agreement on a cogeneration plant which a firm that I worked for was involved in the construction and he leased me some land for our trailers and such and I had also just been the low bidder on a supposed 865 acre tract in Wayne County, low and only bid.

Q Or perhaps it would be better to say the high bid or the successful bid?

A It was the only one that day that I remember.

Q In any event directing your attention again to May [p. 92] 19th, 1988 you arrived in the late afternoon at Mr. Kiley's office.

A That's correct.

Q Was anyone with you?

A No, I dropped off the three representatives five minutes before.

Q Was anyone in Mr. Kiley's office with him?

A I recall no one.

Q Would you tell us what you discussed at his office on May 19th?

A It's my recollection that basically I told him that I would be interested in reviewing the sales agreement but obviously I'm just trying to get enough money to buy the $365,000 plot so I probably wouldn't have enough to execute this and I needed to have this sales agreement to go out as quickly as possible and see if I could get additional people to enter in with me to possibly execute the agreement. I had never seen the agreement before so it was something new to me.

Q Would these be people--might you have characterized these people as co-investors with you?

A Yes, I think that's--

Q Okay. And Mr. Kiley gave you the--a copy of an agreement. Was that the copy of the agreement that was proposed to be signed between the Receiver and Carrier Coal?

[p. 93] A I believe or I believe the name might have been changed or we changed it at the time or something like that, but yes, substantially it was my understanding

it was the same agreement that they had just refused to sign.

Q Did you--how long did you say this meeting lasted?

A I would say five to ten minutes, maximum. I was--quite honestly it was after five and I wanted to go to work.

Q Did you discuss price?

A Yes, I believe that there was a $1,483,000 price at that point.

Q Did you discuss how you would arrive at that price, how that price was determined?

A I think that it had been 1,528,000, now, I could be off on that number, and that when he had--I'll put the Clinton property which was one of the eight properties at that point into my proposal, he had raised that proposal from 365,000 to $410,000. That represented approximately a $45,000 increase and I think if you take those numbers off from one million five twenty-eight you come back quite close to the one million four eighty-three that he was then asking for the remaining seven properties.

Q In any event, at the May 19th meeting, you at least had had enough time to discuss the purchase price and how that price was arrived at?

* * *

[p. 273] A I did not object.

Q Now you have a background of lifetime in banking, Mr. Kiley?

A Yes.

Q And since you retired as President of the First Eastern Bank you've been in the real estate business?

A Yes.

Q You know what an assignment is?

A Yes.

Q You know if there was any question or problem with the identity of a potential assignee it certainly could have been written in the agreement could it have not?

A Yes.

Q And there is no qualifications, no restrictions, no identification, no qualification to the word assigns in this agreement, is there?

A That's correct.")

MR. VANASKIE: That's all we have from Mr. Kiley's testimony.

MR. BRENNAN: I have nothing to add to that.

MR. VANASKIE: Now, Your Honor we have excerpts from the deposition of Barbara Warakomski. Starting at page four, line five.

(Excerpt of deposition testimony of Barbara Warakomski was [p. 274] read as follows by Mr. Vanaskie:

"Q Barbara, by whom or how are you presently employed?

A I am employed at Raymond Colliery Company Receivership.

Q How long have you been employed at Raymond Colliery Company Receivership?

A Since its inception, July 1, 1986.

Q And you work for Mr. Kiley?

A That's correct.

Q Are there any other employees of Raymond Colliery Company Receivership in the office maintained by Mr. Kiley?

A No.

Q Where are those offices located?

A 11 West Market Street, First Eastern Bank Building.")

MR. VANASKIE: That's all I have, Your Honor, on that page. Then I would go to page six, line one.

Q Can you tell me what your duties and responsibilities are presently?

A Well, I am titled administrative assistant and I participate in most of what goes on in the office.

Q When you say you participate in what goes on in the office, do you participate in discussions that Mr. Kiley may have with prospective purchasers of land?

A Yes I do.

[p. 275] Q And do you participate in discussions with Mr. Kiley pertaining to this litigation?

A Yes, I do.")

MR. VANASKIE: Now we turn, Your Honor, to page seven, line fourteen.

("Q Now, do you know Scott Linde?

A Yes, I do.

Q How long have you known Mr. Linde?

A I believe I met him maybe early 1987.

Q And did you participate in discussions or were you participating in discussions that Mr. Linde and Mr. Kiley were involved in concerning purchase of Raymond Colliery properties in Wayne County?

A Yes.

Q Now did you participate in discussions that Mr. Kiley had with representatives of Carrier Coal concerning the land that is the subject of the May 20th, 1988 Agreement of Sale?

A Yes.")

MR. VANASKIE: Your Honor, we turn now to page nine, line ten.

("Q Prior to May 20th of 1988 had there been an agreement reached between Carrier Coal and Mr. Kiley with respect to the land that is the subject of the May 20th, 1988 Agreement of Sale?

A Yes.

[p. 276] Q And was that agreement reduced to writing if you know? Was there a written contract?

A I don't think I can answer that. Would you rephrase it?

Q Well, I'll try. You indicated that, and correct me if I'm wrong, that there had been an agreement between Mr. Kiley and Carrier Coal on these lands that are at issue here and was there then as far as you knew agreement as far as how much money would be paid for the land?

A Well, alright, yes, there was an agreement, a written agreement, that had not been signed but there was a handshake agreement on the written agreement.

Q There was a handshake between Mr. Kiley and representatives?

A Mr. Steinberg.

Q Do you recall what the consideration was, the amount that was to be paid?

A Well, it was something more than $1,483,000 because it included the Clinton bank, a million five something.

Q Now the Clinton bank was eventually conveyed to Mr. Linde, is that not correct?

A That's correct.")

MR. VANASKIE: Page eleven, line nine.

("Q Were you aware prior to May 20th 1988, were you aware of discussions that Mr. Kiley had with Mr. Linde concerning [p. 277] the purchase of the lands in question?

A Prior to May 20th?

Q Yes.

A Yes.

Q And how were you aware of that?

A I was in the office when that discussion took place.

Q Now, your office, Barbara, is it located immediately outside of Mr. Kiley's?

A Adjacent to Mr. Kiley's office, yes.

Q You were in Mr. Kiley's office at the time the discussion between Mr. Linde and Mr. Kiley occurred?

A No, I was in my office.

Q You were in your office but you could overhear?

A Yes.

Q And was this a meeting that Mr. Linde appeared for or was it a telephone discussion?

A Initially it was a phone call.

Q Can you tell me what you remember about the phone call?

A There was a discussion regarding the Clinton bank that the Clinton bank would be included in what we call the Wayne County deal and an indication to Mr. Linde that it would jeopardize perhaps the agreement with Carrier.

Q Do you recall anything--first of all, do you recall when that discussion occurred?

[p. 287] [sic] A Yes.

Q Prior to the time that they were under contract with Scott my understanding is that there had been a

handshake to put these lands under contract of sale to Carrier, is that correct?

A That's correct.

Q Now, once the Clinton culm [sic] bank was taken out of the picture did Mr. Kiley have any discussions with Mr. Steinberg concerning Carrier purchasing the balance of the lands?

A Oh, there was a phone call, I believe there was a phone call to Mr. Myrtetus telling him that the Clinton bank had been removed.

Q And did Mr. Kiley in that phone call offer to sell the balance, what I am calling the balance of land, everything but Clinton for $1,438,000?

A I don't know that the amount was mentioned but the land was available.

Q And what was Carrier's position as you understand it?

A We didn't have a response positive or negative from them at that point.

Q Did Mr. Kiley ever communicate to Mr. Steinberg or Mr. Myrtetus that Scott was interested in purchasing the land before Scott actually consumated the deal?")

MR. VANASKIE: And we go over to page 63,